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ÉTUDE DE FAISABILITÉ SUR L'ADMINISTRATION DU DROIT ÉTRANGER
RÉSUMÉ DES RÉPONSES AU QUESTIONNAIRE

préparée par le Bureau Permanent

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FEASIBILITY STUDY ON THE TREATMENT OF FOREIGN LAW
SUMMARY OF THE RESPONSES TO THE QUESTIONNAIRE

prepared by the Permanent Bureau

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Introduction[1]

1. In April 2006, the then Special Commission (now Council) on General Affairs and Policy of the Hague Conference on Private International Law (the "Hague Conference") invited the Permanent Bureau to prepare a feasibility study on the development of a new instrument for cross-border co-operation concerning the treatment of foreign law.[2]

2. With a view to beginning the assessment of the need for such an instrument, the Permanent Bureau organised a meeting of experts in this area with either a commercial law or family law perspective. This meeting took place on 23-24 February 2007. In preparation for the meeting, the experts were provided with a succinct analysis document drawn up by the Permanent Bureau. At the meeting, the experts were also provided with summary tables on the status of and access to foreign law in a sample of jurisdictions and a sample of legal norms in relation to the treatment of foreign law. A Report on the meeting was prepared for the attention of the Council of April 2007.[3] The experts emphasised "that there should be no attempt to comprehensively harmonise the different approaches to the treatment of foreign law, as there is no need or likelihood of success for harmonisation."[4] The experts acknowledged, however, "that there is clearly a need to facilitate access to foreign law" and "supported the Permanent Bureau's continued work in the area."[5] The meeting concluded that further work was required in order to reach an affirmative or negative answer regarding the feasibility of establishing an efficient and effective instrument under the auspices of the Hague Conference. In particular, the experts suggested that a questionnaire be prepared as part of a more elaborate scientific study.[6]

3. At its April 2007 meeting, the Council invited the Permanent Bureau to develop a questionnaire, as suggested by the meeting of experts, with a view to identifying practical difficulties in accessing the content of foreign law and determining the areas of foreign law for which information is required.[7] This questionnaire would also invite Members to comment on the models suggested in the Report on the meeting of experts and their possible implementation.[8] Finally, the questionnaire should seek to identify in particular whether there is a practical need for the development of such an instrument.

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[1] The Permanent Bureau would like to thank Maja Groff, Assistant Legal Officer, Intern from Canada at the Permanent Bureau from January to July 2008, and Ivana Radic, Legal Officer at the Permanent Bureau, for their assistance in relation to this project

[2] See Prel. Doc. No 11 of June 2006, "Conclusions of the Special Commission of 3-5 April 2006 on General Affairs and Policy of the Conference", for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, para. 4. This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs."

[3] See Prel. Doc. No 21 A of March 2007, "Feasibility Study on the Treatment of Foreign Law – Report on the meeting of 23-24 February 2007", prepared by the Permanent Bureau, for the attention of the Council of April 2007 on General Affairs and Policy of the Conference. This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs." Annex 1 of this document contains a list of the experts who attended the meeting. Annex 2 contains the succinct analysis document drawn up by the Permanent Bureau and which formed the basis for the discussions at the experts meeting. The summary tables and sample of legal norms prepared for the experts meeting are reproduced in Prel. Doc. Nos 21 B and 21 C respectively; both documents are of March 2007 and are also available at < www.hcch.net >, under "Work in Progress" then "General Affairs".

[4] See *ibid*., Prel. Doc. No 21 A, 3rd para. of the introduction.

[5] *Ibid*, 1st para. of the conclusion.

[6] *Ibid.*

[7] See Prel. Doc. No 24 of July 2007, "Report of the Council on General Affairs and Policy of the Conference of 2-4 April 2007", para. 5. This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs".

[8] See Prel. Doc. No 21 A of March 2007, *supra*, note 3, for a description of the models: "Information Sheets and Country Profile Model"; "Network of Experts and Specialised Institutes Model"; "Direct Judicial Communications Model"; and "Revision of the Co-operative Mechanisms of the London and Montevideo Conventions". See also *ibid*., Ann. 2, paras 54-65.

4. Such a Questionnaire was circulated to Members of the Organisation in October of 2007,[9] and the present final document presents data from the 31 Members[10] from which the Permanent Bureau received responses to the Questionnaires before 20 March 2008. A provisional version of this document,[11] including data from 24 Members submitting information before 20 February 2008, and summarizing Parts I to III only of the Questionnaire, was posted on the Hague Conference website and circulated to experts for preliminary comments in early March 2008.

5. The text of the present report follows the lay-out of the Questionnaire.

[9] See Prel. Doc. No 25 of October 2007, "Feasibility Study on the Treatment of Foreign Law" (hereinafter called "the Questionnaire"). This document is available at http://www.hcch.net/upload/wop/genaff_pd25f2008.pdf (French version) and http://www.hcch.net/upload/wop/genaff_pd25e2008.pdf (English version).

[10] These Members included Argentina, Australia, Austria, China (Hong Kong SAR), Croatia, the Czech Republic, Denmark, Egypt, Estonia, the European Community (Part IV of the Questionnaire only), Finland, France, Germany, Hungary, Iceland, Italy, Japan, Latvia, Lithuania, Malaysia, Netherlands, New Zealand, Poland, Romania, Slovakia, Slovenia, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America. All individual responses to the Questionnaire are posted on the Hague Conference website at the following address: < www.hcch.net > under "Work in Progress," "General Affairs," "Individual Responses to the Questionnaire on the Treatment of Foreign Law."

[11] Prel. Doc. No 9 A of 3 March 2008, "Feasibility study on the treatment of foreign law - Summary of the responses to the Questionnaire," provisional version in English only.

Part I – Status of implementation and operation of treaties on proof of or information on foreign law (Questions 1-8)[12]

A) Status of implementation of treaties on proof of or information on foreign law (Questions 1-2)

6. Twenty-one of the 30 responding States[13] are a Party to the London Convention[14] and only one State, Argentina, is a Party to the Montevideo Convention.[15] No States declared that they were Parties to the Minsk Convention.[16]

7. Regarding the number of bilateral treaties on proof of or information on foreign law[17] to which States are a Party, there was a wide margin of divergence among the responses. Ten of the 27 States that provided data on this question reported that they were not Parties to any bilateral treaties relevant on proof of or information on foreign law.[18] As for the other 16 States that responded, the number of bilateral treaties to which they are Parties ranges from 1 to over 30.[19]

8. Of the 24 States that answered Question 2, only five indicated that they intended to become Parties to treaties pertaining to the treatment of foreign law beyond their current treaty obligations in this area.[20] All States but one[21] that reported their intention to enter into new treaty obligations indicated that they were doing so in the area of bilateral treaties, rather than under the London, Montevideo, or Minsk Conventions.

B) Status of operation of treaties on proof of or information on foreign law (Questions 3-4)[22]

1) Received requests[23]

9. Fifteen of the 21 States that indicated that they were Parties to the London Convention provided data regarding received requests under the Convention and timeframes for the fulfilment of these requests. States indicated that they received between 0 and 31 requests in 2006 from other State Parties to the London Convention,

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[12] See the status table for a summary of information contained in Part I in Annex 1 to "Feasibility study on the treatment of foreign law – Summary tables and charts of certain responses to the Questionnaire", Prel. Doc. No 9 B of March 2008. As with Prel. Doc. No 9 A, this document takes into account replies to the Questionnaire received up to 20 March 2008.

[13] For the sake of economy, the term "State" will be used generally in this document to indicate Members of the Organisation. The European Community, which is the only Regional Economic Integration Organisation ("REIO") Member of the Organisation, has not provided specific answers to this Questionnaire, but rather issued a general policy statement which is described under Part IV of this report.

[14] The *European Convention of 7 June 1968 on Information on Foreign Law* (the "London Convention").

[15] The *Inter-American Convention of 8 May 1979 on Proof of and Information on Foreign Law* (the "Montevideo Convention").

[16] The *Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters* (the "Minsk Convention").

[17] In this report, the term "foreign law" encompasses both foreign internal (substantive) law and foreign private international law. The term "bilateral treaty" encompasses any treaty on proof of or information on foreign law.

[18] See table in Annex 1, *supra,* note 12.

[19] Argentina is Party to 5 bilateral treaties, Australia to 2, Austria to an unspecified number, the Czech Republic to 29, Egypt to an unspecified number, Estonia to 5, Finland to 4, France to 24, Germany to 1, Hungary to 26, Latvia to 9, Lithuania to 11, Poland to 30, Romania to more than 30, Slovakia to 26, and Slovenia to 13. See table in Annex 1, *ibid*. It is interesting to note that Argentina indicated that it is Party to four other multilateral or regional treaties that deal with inter-state assistance in matters of foreign legal information. Romania noted that it had more than 20 bilateral co-operation agreements made between inter-state ministries of justice in order to share legal information for comparative law purposes.

[20] Argentina, Croatia, Egypt, Poland and Slovenia. See table in Annex 1, *id.*

[21] Croatia reported that it intends to become a Party to the London Convention.

[22] Please see the table in Annex 2 of Prel. Doc. No 9 B, *supra,* note 12, for a chart of the various request levels and response times reported per country per treaty.

[23] *Ibid.*

the average being ten requests, and that the response time to these requests varied from between 1 week and 24 weeks, the average being nine weeks.

10. The only State that indicated that it was Party to the Montevideo Convention, Argentina, also indicated that it did not have statistics specific to this instrument.[24]

11. Of the 16 States that indicated they were Party to bilateral treaties, 11 provided data on request levels and response times under these treaties. The number of requests received by responding States ranged from between 0 to 25 requests, the average being five requests. The time to reply to requests ranged from between 1 to 24 weeks, the average being seven weeks.

2) Outgoing requests[25]

12. Thirteen of the 21 States that indicated that they were Party to the London Convention provided data on the number of requests they made and the time that was necessary to receive responses to these requests. The number of requests ranged from 0 to 38, the average being 13 requests, and the time to receive requests ranged from 2 weeks to 24 weeks, the average being 16 weeks.

13. Nine of the 16 States that indicated they were Party to bilateral treaties provided data on these treaties. The number of requests emanating from State judicial authorities ranged from 0 to up to 42,[26] with the average being six requests. Response time varied from 4 weeks to 25 weeks, the average being 15 weeks.

14. There was no data submitted by responding States regarding the number of requests and response times emanating under the Montevideo and Minsk Conventions.

C) Estimated foreseeable increases in requests and areas of law foreseen under current treaties (Questions 5-6)

15. Twenty-two States provided data as to the estimated foreseeable increases in requests. Ten responding States foresaw an increase in the number of incoming requests of information on foreign law under the above-mentioned treaties,[27] while 12 States reported that they did not foresee an increase or thought that it was unlikely.[28]

16. Ten of the 22 responding States indicated that they anticipated an increase in outgoing requests for information on foreign law in the coming years,[29] while 12 indicated that they did not foresee an increase in the near future.[30]

17. The ten States that reported that they foresaw an increase of incoming requests for information of their national law under their various conventional obligations foresaw these increases to be predominantly in the areas of family law, inheritance law, and business or commercial law, in this order of importance.

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[24] However, Argentina indicated that its foreign embassies or *la Dirección de Asistencia Judicial Internacional, de la Dirección General de Asuntos Jurídicos del Ministerio de Relaciones Exteriores, Comercio Internacional y Culto*, handled numerous requests for information on Argentinean law, either under the Montevideo Convention or under general enquiries not pertaining to any convention.

[25] Please see table in Annex 2 of Prel. Doc. No 9 B, *supra,* note 12.

[26] Please note that Slovenia reported that it sent 42 requests under *both* the London Convention and bilateral treaties.

[27] Argentina, Austria, the Czech Republic, Egypt, Latvia, Lithuania, Poland, Slovakia, Switzerland and Turkey.

[28] Australia, Denmark, Estonia (citing the increasing availability of legal information on the internet), Finland, France, Germany, Hungary, Iceland, Italy, Netherlands, Romania and Slovenia.

[29] Argentina, Austria, the Czech Republic, Egypt, France, Latvia, Lithuania, Poland, Slovakia and Turkey.

[30] Australia, Denmark, Estonia, Finland, Germany, Hungary, Iceland, Italy, Netherlands, Romania, Slovenia and Switzerland.

18. Seven States listed requests for information concerning family law and the law of inheritance as likely to increase in the future.[31] Two States listed that they foresaw an increase in requests pertaining to topics of business and commercial law,[32] while six States in total listed particular areas of commercial law as subject to increasing requests, such as the areas of contracts,[33] company law,[34] intellectual property,[35] bankruptcy,[36] and property law.[37] The Czech Republic also foresaw an increase in future requests pertaining to information on legal aid, Latvia foresaw an increase in the area of torts, and Egypt in the area of criminal law.

19. The predictions of foreseeable increases in the number of outgoing requests for information on foreign law under relevant treaties largely mirrored the data reported regarding incoming requests.

20. Eight of the ten States reporting on this question foresaw an increase in outgoing requests pertaining to family law matters,[38] and four foresaw an increase in requests for information pertaining to the law of inheritance.[39]

21. Three States foresaw increases in outgoing requests pertaining to business or commercial law generally,[40] and two States specified that they foresaw that outgoing requests regarding contractual law would increase.[41]

22. Other States foresaw an increase in requests pertaining to labour law,[42] liability,[43] service of documents,[44] legal aid,[45] property law,[46] and the protection of minors and adults.[47]

In sum, the answers received to date seem to reflect that:

- A majority of reporting Member States are Party to the London Convention.
- Over half of reporting States are Party to one or more bilateral treaties that have provisions for the sharing of foreign law.
- States receive and send between 0 and 38 requests under bilateral or multilateral treaties on foreign law per year, with an average of nine requests.
- Delays to respond to or receive a response from a request under one of these treaties range from 1 week to 25 weeks, with an average response time of 12 weeks.
- A slight majority of States reported that they do not foresee an increase in incoming and outgoing requests in the future.

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[31] Argentina, the Czech Republic, Egypt, Latvia, Poland, Slovakia and Turkey.
[32] The Czech Republic and Poland.
[33] Austria, Latvia, Lithuania and Switzerland.
[34] The Czech Republic and Switzerland.
[35] Lithuania.
[36] *Ibid*.
[37] Poland.
[38] The Czech Republic, France, Lithuania, Poland, Slovakia and Turkey.
[39] Austria, Poland, Slovakia and Turkey.
[40] Argentina, the Czech Republic and Poland.
[41] Austria and Latvia.
[42] Argentina.
[43] Austria and Latvia.
[44] *Ibid*.
[45] The Czech Republic.
[46] Poland.
[47] France.

D) Satisfaction and shortcomings with present treaty instruments relevant to proof of or information on foreign law (Questions 7-8)

1) Satisfaction

23. Twelve States[48] gave a response concerning their level of satisfaction with present treaty instruments relevant to proof of or information on foreign law, with four States stating that they were generally satisfied with the functioning of the London Convention,[49] various bilateral treaties to which they are a Party,[50] or the London Convention and various bilateral treaties together.[51]

24. Positive comments with regard to the functioning of both the London Convention and the range of bilateral treaties to which States are Party were varied. These comments include: that it is clear where to address inquiries;[52] that the information on foreign law is available free of charge;[53] that the information is of good quality because it is clear and exhaustive,[54] yet also specific regarding the application of the laws put in question;[55] that it is often possible to obtain information about foreign law from colleagues;[56] and that the speed of receiving information is good.[57]

25. Some States expressed their greater satisfaction with the London Convention as opposed to their bilateral treaty engagements, for a number of reasons. Hungary is satisfied that the scope of the London Convention has the potential to be enlarged to include administrative and criminal law[58] as well as the areas of civil and family law. On the other hand, Lithuania noted that its bilateral treaties in general have provisions whereby States Parties commit to provide each other with information on criminal law, and not only civil and commercial law, which is the default provision of the London Convention under Article 1.1.

26. Hungary also lauded the London Convention for the fact that it is not reserved only for Members of the Council of Europe, but that all other countries can accede to it freely.

27. The Czech Republic noted that it found the London Convention more useful than its bilateral commitments, as most of its bilateral treaties were concluded during the communist era, and that the application of those treaties is now limited.

28. France reported the extent of its satisfaction with the London Convention in that: 1) it is possible to draft a request in the language of the requested State; 2) that there is a centralization of reception of requests in order to co-ordinate their treatment and verification; 3) that there is a possibility of orienting the request according to the level information sought and to a relevant person or expert structure; and 4) that the Convention provides a guarantee of the reliability of the information provided.

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[48] Australia, Austria, the Czech Republic, Estonia, France, Germany, Hungary, Lithuania, Netherlands, Poland, Slovakia and Switzerland.
[49] The Czech Republic stated that the London Convention has been "very useful and we have had very good experiences with its application." Germany stated that "[t]he concept of the London Convention still appears to be sensible and expedient today."
[50] Australia.
[51] Slovakia reported that its Ministry of Justice and the Slovak courts are "highly satisfied" with the treaty instruments to which it is a Party pertaining to treatment of foreign law, while Estonia noted that it is satisfied with these instruments in the case of official inquiries into foreign law.
[52] Austria.
[53] Hungary.
[54] Austria.
[55] Austria and Hungary.
[56] Netherlands.
[57] Hungary. Poland, however, stated that the speed of receiving information subsequent to a request can vary according to the requested country.
[58] See *Additional Protocol to the European Convention on Information on Foreign Law*, Strasbourg, 15/03/1978.

29. Lithuania commented that it was generally satisfied with the way Contracting Parties followed the time-limit for reply provision (Art. 12) of the Convention. Germany commented that the system of channelling requests through a designated national transmitting authority did not unduly delay the transmission of these requests from courts. Switzerland stated that it was satisfied with the absence of excessive formality under the London Convention.

2) Shortcomings

30. Eleven States gave comments regarding shortcomings that they have noted of present treaties pertaining to proof of or information on foreign law.

a. The London Convention and bilateral conventions in general

31. A number of States[59] criticized the lengthy time sometimes taken to receive replies to requests under the various treaties (including time for translation[60]).

32. Poland criticized the lack of obligatory terms in the instruments pertaining to the execution of requests, and reported that the quality of replies received from requested States was highly variable.

33. Romania reported that it was often difficult to formulate in an abstract manner the legal questions that formed the substance of the request, and that it found that questions it received were frequently posed in an unclear manner.

34. Austria noted that it found it problematic when a receiving authority of a request asks the requesting authority for reimbursement for its services.

b. The London Convention

35. Responding States had a wide range of concerns regarding the functioning of the London Convention. Two States[61] questioned the overall practical utility of the Convention. Turkey suggested that obtaining information on foreign law through diplomatic channels is preferred to the Convention for outgoing requests, and several States suggested that the instrument's limitations are particularly evident in the context of complex commercial litigation[62] and in complex litigation generally.[63]

36. Three States criticized the lengthy timeframe generally needed to make and receive a reply to a request, so as to make use of this instrument impracticable for obtaining information on foreign law.[64]

37. Two States expressed concerns about the quality of translations generally given under the Convention, and in particular issues of translation that arise under Article 14.1 of the Convention.[65]

38. France suggested a perceived failing of the instrument in that it does not make provisions for a standardized request form under Article 7 of the Convention, which could permit the identification of the level of information needed from the requested country. Switzerland complained that it is generally not made clear how much knowledge the

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[59] Austria, the Czech Republic, Estonia, Germany and Slovenia. Romania suggested that requests for information should contain an express timeline within which the information on foreign law is required.
[60] Austria.
[61] Turkey and the United Kingdom.
[62] The United Kingdom.
[63] Switzerland.
[64] France, Turkey and the United Kingdom. France frames the problem in the following way: "the delays in response are left to be determined by the requested country only, without the requesting jurisdiction being able to assert a shorter delay, because of the procedural constraints to which it is bound. The unwieldiness of the mechanisms and the length of delays in response dissuade jurisdictions from using this method to access foreign law."
[65] Switzerland and Lithuania, respectively.

requesting authority already possesses. Turkey complained that there is a deficit in information regarding the implementation of the London Convention.

39. Finally, Lithuania complained of the general limitation of scope of the London Convention to civil and commercial matters only by default, without including the fields of criminal and administrative law, or other rules which are not technically within the civil or commercial law fields.

c. Bilateral treaties only

40. Lithuania reported on the shortcomings of the provisions of the bilateral treaties to which it is a Party, primarily that there is frequently not a time-limit for reply to queries indicated in the instrument. Such an absence of stipulation is reported to result in a lengthy delay in receiving responses (up to 12 weeks and longer), and is a problem compounded by the fact that notice of the delay or potential delay is not communicated, thereby contributing to greater uncertainty for the requesting party.

In sum, the answers received to date seem to reflect that:

- Almost half of responding States gave grounds for satisfaction with their treaty obligations concerning foreign law, with particular praise for the London Convention.
- Almost half of responding States gave grounds for their dissatisfaction and suggestions for improvement of treaties, notably with regard to time delays when using the instruments and the use of the instruments in the case of complex litigation.

Part II – Free Public Access to Information on the Content of the Law[66]

A) Online access to legislation through official websites (Question 9)[67]

41. The overwhelming majority (29 of 30 responding States) indicated that they provide online information on their legislation via an official government website.[68] Of these 29 States with official websites for legislation, 18 reported that they provide this information exclusively or as a rule in the official national language[69] or languages.[70] Of the seven States that reported official online sources of legislation in other languages besides their official language(s), the most common language of translation was English,[71] but also included such languages as French, Spanish, and Russian.[72]

B) Policies of States in response to general requests for information on the content or application of its law (Question 10)

42. Twenty-four of the 30 responding States reported affirmatively that their government (or government ministries) did respond to written or oral requests for information on the content or application of their law,[73] although a number of States indicated that oral requests were exceptional.[74] Further, several States[75] emphasized that they responded (or *could* respond on a discretionary basis[76]) to requests via relevant government agencies on an *ad hoc* basis, and that they did not have specific, official services in this area. Four States[77] specified that they responded only to official requests for information, under their treaty or other national obligations.[78]

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[66] A table summarizing results for this Part (Questions 9-13) is contained in Annex 3 of Prel. Doc. No 9 B, *supra*, note 12.

[67] In the course of its research the Permanent Bureau found references to a growing number of multi-national publicly funded or non-profit databases and search engines available online to access worldwide and regional primary and secondary legal resources. One notable database among these is the Global Legal Information Network (GLIN) run by the United States of America Library of Congress. GLIN, according to the organisation's website (http://www.glin.gov/search.action), "is a public database of official texts of laws, regulations, judicial decisions, and other complementary legal sources contributed by governmental agencies and international organizations [GLIN members]." A number of GLIN members are also Members of the Hague Conference, such as Argentina, Brazil, Canada, Ecuador, the Republic of Korea, Lithuania, Mexico, Panama, Paraguay, Romania, Russia, Ukraine, the United States of America and Uruguay. GLIN members contribute full texts of published legal documents in original languages. English summaries are published with these texts and all summaries and most full texts are available for free to the public through the GLIN website. Information on GLIN is searchable through an index of key terms that is available in 13 languages and that searches simultaneously in 13 these languages.

[68] Malaysia was the only State that indicated it did not have an official online source of government legislation, but instead relied on private, non-governmental websites such as Percetakan Nasional Malaysia Berhad, CLJ Legal Network Sdn. Dhd. and the LexisNexis Group.

[69] Argentina, Australia, Croatia, the Czech Republic, Denmark (except for some acts and executive orders occasionally provided in English), Germany (except for an English translation of the Civil Code), Hungary, Iceland, Latvia, New Zealand, Netherlands, Poland, Romania, Slovakia, Slovenia, Turkey, the United Kingdom (except for statutory instruments from the National Assembly of Wales provided in Welsh as well as English) and the United States of America.

[70] Switzerland reported that it provides online legislation in its three official languages, French, German and Italian. China (Hong Kong SAR) reported that it provides online legal resources in Chinese and in English.

[71] Austria, Estonia, Finland, France, Japan, Lithuania and Sweden.

[72] Finland and Sweden also reported that some of their legislation is available in French. Lithuania also provides its "basic laws" in Russian. France reported that its main laws, regulations, and jurisprudence are available in Spanish as well as in French and English.

[73] China (Hong Kong SAR), Germany, Hungary, Malaysia, Netherlands and Slovenia indicated that they do not provide such a service, whether formally or informally. Slovenia and Hungary indicated that non-governmental legal information centres provide these services.

[74] France and Lithuania.

[75] Australia and New Zealand.

[76] The United Kingdom.

[77] The Czech Republic, Egypt, Hungary and the United Kingdom.

[78] For example, the Czech Republic reported that under Czech law, the Ministry of Justice has the obligation to settle requests from Czech courts about the content of foreign law.

43. States clarified that their responses to public or other requests for information on national law, whether centralized through the Ministry of Justice[79] or through the relevant ministry in charge of the subject matter,[80] provided only general information on the law, and would not give information or advice on the application of law to a particular case in a way that would be considered to be legal advice.[81]

44. Most States reported that their informational services, whether formal or informal, generally encompass all areas of internal substantive law and private international law. The Czech Republic emphasized the importance of family and inheritance law, and Lithuania emphasized the importance of purchase and sale contract law, intellectual property law, and the law of contractual or tortious liability.

45. A number of States highlighted other structures or sources of legal aid and information for the public which work in tandem with government ministry resources of information on their laws.[82] Also, among those States that reported that they did not respond to requests for information on their law, the Netherlands specified several private organisations[83] that provide information on the content or application of its law, and Germany detailed that private solicitors or associations of which individuals are members are the sources of information on the application of its law.

C) Availability of services to people in other States (Question 11)

46. All States but four[84] indicated that such services as specified in Question 10 were also available to people in other States. Ten States providing this service reported that they supply this legal information in the official language only,[85] while ten other States reported that they generally or sometimes could provide this service in other languages.[86]

D) Costs for legal information services for people in other States (Question 12)

47. All responding States that specified that they provide a service for people in other States (under Question 11) stated that they provide this service at no charge. A number of States emphasized that this was a matter of law or policy, and that no distinction was made between foreign or domestic requests, even if the service was provided by the government or ministries on an informal basis.[87]

E) Foreseeable increases in the proportion of people in other States using the services mentioned in Question 10 (Question 13)

48. The majority (16) of the 20 States that provided data on this question foresaw that there would likely be an increase in the proportion of persons in other States using the aforementioned legal information services, be they formal or informal.[88] Four States stated that they did not foresee an increase in the number of people in other States

[79] As in France, for example.
[80] As in Japan and New Zealand, for example.
[81] Estonia, France, New Zealand, Romania, Switzerland and the United Kingdom.
[82] France, Poland and the United States of America.
[83] The International Legal Institute and the TMC Asser Institute, both located in The Hague.
[84] The Czech Republic, Italy, Malaysia and the United Kingdom (although the United Kingdom indicated that information *may* be provided in some circumstances on a discretionary basis).
[85] Argentina, Australia, Croatia, France, New Zealand, Poland, Slovakia, Slovenia, Turkey and the United States of America (and the United Kingdom when providing information on a discretionary basis).
[86] States able to provide information in English include Austria (sometimes), Estonia (primarily English), Finland (if needed), Hungary (as well as in German and French), Japan, Latvia (in practice, although government officials are obligated to respond only in the official language), Lithuania (also in Russian), Romania (regarding some laws only, and in French as well), Sweden (in French also) and Switzerland.
[87] Australia, France, Hungary, New Zealand, Romania and Slovakia.
[88] Argentina, Australia, Austria, Croatia, Egypt, Estonia, France, Japan, Latvia, Lithuania, Netherlands, New Zealand, Poland, Slovenia, Turkey and the United States of America.

using these services in the future.[89] The United States of America commented generally that: "[t]he need for access to information on the content of foreign law continues to increase [...] a mechanism to provide such access is likely to be used by a greater number of people if the services are available and if access is efficient, reliable, and cost effective."

In sum, the answers received to date seem to reflect that:

- The overwhelming majority of States provide online information on their legislation via an official government website, sometimes with this information in one or several non-official languages.
- Most States respond to written or oral requests for information on their laws at no cost and without distinguishing as to whether the request originates from within or from outside the State.
- A majority of States foresee an increase in demand for these services by persons outside their State in the coming years.

[89] Finland, Hungary, Romania and Sweden.

Part III – Access to information on the content of foreign law at the litigation stage

49. Twenty-eight[90] of the 30 States responding to the Questionnaire provided data pertaining to access to information on content of foreign law during the litigation stage, although the extent of statistics kept by jurisdictions varied widely.

A) Percentage of cases requiring the application of foreign law (Question 14)

50. Twelve responding States reported a percentage figure for the proportion of civil and commercial law cases heard by State judicial authorities in 2006 that required the application of foreign law,[91] and one State[92] reported a raw number statistic of 15 cases for the year of 2006. Five States reported a figure of 0-1% for the proportion of civil and commercial cases involving foreign law in 2006,[93] and three States reported a statistic of 2%.[94] Sweden and Germany reported an overall figure for cases of civil and commercial law of 5%. Malaysia and the Netherlands both reported the highest statistic of 10% of cases.

51. France further broke down the statistic relevant to civil and commercial law to report that between 10 and 15% of all national cases that dealt with status of persons or family law issues required the application of foreign law.

52. Twelve of the 14 States[95] reporting on this question predicted that there would be an increase in the number of cases that involved the application of foreign law, while two States, Finland and Germany,[96] did not foresee an increase. The United States of America specified that in its opinion the number of cases involving the application of foreign law will very likely continue to rise as the number of international commercial transactions litigated in the United States of America continues to rise. The United States of America also detailed that its federal judiciary was being actively encouraged to "address and use foreign law where appropriate."

B) Most common areas of foreign law applied by or invoked before the State judicial authorities (Question 15)

53. While a number of States did not keep recorded information on the most common areas of foreign law applied by or invoked before the States' judicial authorities,[97] the data of the 24 States that did supply information for this question are represented in an annexed chart.[98]

54. Several States that did not possess specific data made informal comments about what areas of law they conceived to be the most frequently invoked in their courts. Australia identified laws of marriage, property law, and inheritance law as common areas. Denmark cited family law, competition law, patent rights, and transportation laws.

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[90] Australia, Austria, China (Hong Kong SAR), Croatia, the Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Hungary, Iceland, Japan, Latvia, Lithuania, Malaysia, Netherlands, New Zealand, Poland, Romania, Slovakia, Slovenia, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America.

[91] Croatia, Finland, France, Germany, Iceland, Latvia, Malaysia, Netherlands, Slovakia, Slovenia, Sweden and Switzerland.

[92] The United Kingdom.

[93] Croatia (1%), Finland (0-1%), Iceland (0%), Latvia (less than 1%) and Slovenia (.27%).

[94] France, Slovakia and Switzerland.

[95] Austria, Croatia, the Czech Republic, Hungary, Iceland, Latvia, Malaysia, Netherlands, Slovakia, Slovenia, Sweden and the United States of America.

[96] Germany reported that it did not foresee an increase because of the frequent practice of parties before German courts agreeing to apply German law in place of the otherwise applicable foreign law.

[97] Australia, China (Hong Kong SAR), Denmark, Japan and New Zealand.

[98] See chart in Annex 4 of Prel. Doc. No 9 B, *supra* note 12. States represented in this chart are Australia, Austria, Croatia, the Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, Iceland, Latvia, Lithuania, Malaysia, Netherlands, Poland, Romania, Slovakia, Slovenia, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America.

55. France, which possessed statistics, offered an overall percentage breakdown of most common areas of foreign law invoked before its courts, including the law of divorce and separation (18%), international protection of children including abduction and adoption (16%), and marriage and annulment of marriage (15%).

C) States whose laws are most frequently applied by or invoked before judicial authorities (Question 16)

56. While again, a number of States did not have data on this subject,[99] the data that was provided by those States that had information on this topic was widely variable according to geographic situation and other historic or contemporary political ties with foreign States. For instance, Finland reported that it most frequently applied the laws of other European Union Member States, such as England, Belgium and Poland. France reported that 50% of the foreign law applied was from nations of the Maghreb, Hungary reported that its courts most frequently applied the laws of Germany and Austria, and Malaysia reported that the laws of England, India, Australia, and Singapore were most frequently applied by its courts.

In sum, the answers received to date seem to reflect that:

- Overall, only a small proportion of civil and commercial law cases in reporting States currently require the application of foreign law.
- The most common area of law where foreign law is applied is family law, including the international protection of children; it appears that foreign law is applied more frequently in family law cases than in civil and commercial cases.
- Where foreign law is applied it is most often the law of a State with which the forum State has a regional, political, or historic tie.

D) Ways in which judicial authorities ascertain foreign law (Question 17)

57. The results of the Questionnaire regarding States' responses to the way judicial authorities ascertain foreign law are shown in an annexed chart.[100] As this table demonstrates clearly, as do the summary tables in Preliminary Document No 21 B,[101] a variety of measures are used across jurisdictions in order to ascertain foreign law that are not associated with specific legal traditions.[102] It reaffirms the conclusion that has already been drawn to the effect that harmonisation of the different approaches to the treatment of foreign law is likely impossible, or—at best—impractical.[103]

E) Sources of foreign law consulted by judicial authorities (Question 18)

58. The resource of law on the Internet, in the form of "official legislation, case-law and legal publications websites" was most frequently cited and ranked highly as a primary source of foreign law.[104] Fifteen of the 16 States providing a response to this question

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[99] Australia, Denmark, Iceland, Japan, New Zealand, Romania and the United Kingdom did not possess data.

[100] See chart in Annex 5 of Prel. Doc. No 9 B, *supra* note 12. The chart shows responses from the following States: Australia, Austria, China (Hong Kong SAR), Croatia, the Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, Iceland, Japan, Latvia, Lithuania, Malaysia, Netherlands, New Zealand, Poland, Romania, Slovakia, Slovenia, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America.

[101] See, *supra*, note 3.

[102] Annex 2 ("The Treatment of Foreign Law Succinct Analysis Document") to Prel. Doc. No 21 A, *supra,* note 3, at para. 14.

[103] *Supra*, note 4.

[104] For example, Denmark specified that it commonly used the legal databases from the EU (such as the European Judicial Atlas) or other free databases deriving from public institutions.

cited this as a resource within the top four, with ten of those States citing it as the number one source.[105] Responding States reported that local or personal libraries which included printed legislation, case-law and legal publications were the second main source of information on foreign law,[106] while internet resources from private (external) databases were the third,[107] and local or personal libraries which included local electronic databases were the fourth most popular resource.[108]

59. Other important resources for information on foreign law that were reported include information provided by the parties involved in litigation,[109] by diplomatic representatives,[110] by institutes of comparative law,[111] from contacts that members of courts may have obtained through international co-operation between courts,[112] or from official libraries and database at the State's Ministry of Justice.[113]

F) Verification or authentication of sources of foreign law (Question 19)

60. As to the verification of the reliability or authenticity of sources of foreign law, there was an overarching theme that, as one State asserted,[114] the method of verification depended in large part on the way in which the information was obtained.[115]

61. The majority of responding States,[116] however, reported that they had no standard secondary mechanisms or procedures by which to verify sources and information provided on foreign law, whether received in paper or electronic format. A majority of States also indicated that when the source of foreign law was considered to be an official source, whether obtained through an appointed foreign agency under a treaty or agreement, from a competent foreign agency, or from an online official foreign governmental website, etc., the information was presumed to be authenticated.[117]

62. A number of States responded that they did have established methods for verifying official or non-official sources of foreign law. Several States reported that their courts considered foreign law to be a matter of fact and thus was subject to a standard of reliability based on the relevant standards of proof required and according to the

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[105] Austria (ranked as 2nd), Croatia (1st), the Czech Republic (1st), Denmark (4th), Finland (1st), France (1st), Germany (2nd), Lithuania (1st), Malaysia (1st), Netherlands (2nd), Romania (1st), Slovakia (1st), Slovenia (4th), Switzerland (1st) and Turkey (1st).

[106] Austria (1st), Croatia (2nd), Denmark (2nd), Finland (2nd), France (2nd), Germany (1st), Lithuania (3rd), Malaysia (3rd), Netherlands (1st), Romania (2nd), Slovakia (2nd), Slovenia (2nd), Switzerland (2nd) and Turkey (2nd).

[107] Austria (3rd), Croatia (3rd), the Czech Republic (2nd), Denmark (5th), France (3rd), Germany (4th), Lithuania (2nd), Malaysia (2nd), Netherlands (3rd), Slovenia (5th), Switzerland (3rd), Turkey (4th) and the United States of America (1st).

[108] Croatia (4th), Denmark (3rd), France (4th), Germany (3rd), Lithuania (4th), Malaysia (4th), Netherlands (4th), Slovenia (3rd), Switzerland (4th) and Turkey (3rd).

[109] Croatia (ranked as 5th most important), China (1st and only source; using an expert witness before the court), Denmark (1st), Latvia (1st and only source), Switzerland (no ranking) and the United Kingdom (1st).

[110] Switzerland.

[111] *Ibid*.

[112] Denmark.

[113] The Czech Republic (ranked as 3rd most important resource).

[114] Slovenia.

[115] In the course of its research in relation to foreign legal resources obtained via the internet, the Permanent Bureau found a recent (March 2007) study published by the American Association of Law Librarians (AALL) (available online at http://www.aallnet.org/aallwash/authenreport.html), entitled "State by State Report on Authentication of Online Legal Resources." In the course of this AALL investigation within the United States of America, the AALL discovered that in many states of the United States of America, legal documents termed "official" that were posted online were not authenticated (*i.e.*, "their content has not been verified by a government entity to be complete and unaltered compared to the version approved or published by the content originator," p. 8 of the AALL report), and sometimes replaced print resources without any mechanisms for appropriate digital archiving or authentication.

[116] Austria (the authenticity or reliability of foreign law is only checked "in rare cases" if one party raises doubts), the Czech Republic, Denmark, Estonia (at the discretion of the court), Finland, France, Lithuania, Netherlands, Slovakia and Turkey.

[117] Denmark, Finland, France, Germany, Lithuania, Romania, Slovakia, Switzerland and Turkey.

presiding judge's scrutiny.[118] States also detailed such discretionary mechanisms (when the judicial authority has doubts) as sending a request to the national Ministry of Justice,[119] or under a treaty or through diplomatic channels,[120] by cross-checking the information with printed legislation, case law, and legal publications,[121] by consultation with an expert institute,[122] or lastly, by consultation with an individual expert provided by the Ministry of Justice,[123] by the parties,[124] or by the court.[125]

G) Translation mechanisms for law resources in a foreign language (Question 20)

63. In general, States responding to this question indicated that it was either the party's responsibility to litigation to arrange for and provide an appropriate (often certified) translation of foreign law to the court,[126] that the court would arrange for a translation itself (such as through the appointment of a court translator),[127] or that there existed a combination of these two mechanisms according to the circumstances or judicial discretion.[128] For instance, if one of the parties to litigation fails in its duty to provide a translation, the court can arrange for a translation to be made, and then allot the cost to the party who raised the question of foreign law, who may in turn be compensated by the party who is found liable for costs at judgment.[129]

64. Only one State, Malaysia, reported that their courts rarely encountered this problem, as most foreign law invoked or applied is in English.

H) Nature of qualified expert or expert institution, national and foreign (Questions 21-22)

65. Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and i) of Question No 17), five States[130] responded affirmatively that this expert needs to be a qualified lawyer or jurist in accordance with the law of their State or, in the case of a specialised institute, needs to meet certain requirements. The majority of responding States[131] reported that under the law of their State, such qualifications or certification requirements are not generally needed.

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[118] Australia, China (Hong Kong SAR) and the United Kingdom. Also, in Australia, one party to litigation may challenge other party's presentation, and when an expert is appointed by the court, parties are not bound by this expert's testimony.
[119] Croatia, Latvia and Slovenia. Croatia specified that the Ministry, after receiving a request from a judicial authority, will then make enquiries on the relevant law through diplomatic channels.
[120] Egypt and Latvia.
[121] Germany, Malaysia, Romania and Switzerland.
[122] Switzerland specified the *L'Institut Suisse de droit comparé*.
[123] Poland.
[124] China (Hong Kong SAR) and the United States of America.
[125] Germany (Germany reported that when a court had doubts on the reliability of foreign law, it could commission an expert report on the matter), Romania and the United States of America (in only about 5% of cases).
[126] Australia, China (Hong Kong SAR), Iceland, Japan, Latvia and the United Kingdom.
[127] The Czech Republic, Finland, Hungary, Lithuania, Poland, Slovakia and Slovenia. In the case of Hungary, the Minister of Justice and Police must inform tribunals and other judicial authorities of the content of foreign law, which would include appropriate translation.
[128] Austria, Croatia, Denmark, Estonia, France, Latvia, Romania, Switzerland, Turkey and the United States of America. France reported that when the request for foreign law is made through a treaty or convention by request of a party, the parties are responsible for providing an adequate translation, and that if the translation provided by the appropriate party is insufficient, the judge will apply French law to supplement the foreign law. France further specified that when research into foreign law was at a judge's discretion and is made through informal channels, a translation may be made by the solicited diplomatic representative or consulate, with the technical support of the liaison magistrate, or by the French Justice Ministry, *Service des Affaires européennes et internationales*. Latvia reported that where a request for information on foreign law was submitted under a treaty, be it *ex officio* or at the request of one of the parties to litigation, an appropriate translation would be provided by the Latvian Ministry of Justice.
[129] Denmark, France and Turkey. Turkey reported that in general it was the judicial authority who would always arrange for the translation, but would then allot the expense to the relevant party or parties.
[130] Croatia, Poland, Sweden, Switzerland (in 50% of Cantons) and the United Kingdom.
[131] Australia, Austria, Egypt, Estonia, France, Germany, Japan, Malaysia, Netherlands, New Zealand, Romania, Switzerland (in 50% of cases) and Turkey.

66. Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and i) of Question No 17), four States[132] responded affirmatively that the expert, in general, needs to be a qualified lawyer or jurist in accordance with the law of the State whose laws are being ascertained, or in the case of a specialised institute, needs to meet certain requirements. The majority of responding States[133] reported that such qualifications or certification requirements, under the law of the State whose laws are ascertained, are not generally needed.

67. However, for both Questions 21 and 22, Australia, China (Hong Kong SAR), New Zealand and Romania reported that those consulted on the content of foreign law must meet the procedural rules that define the threshold to be considered an "expert" in the relevant area and thus this may *de facto* imply relevant certifications and qualifications. The United States of America also reported that while no such requirements exist as a matter of law, the relevant selected expert would most likely to be a qualified lawyer, jurist, governmental official, or recognized academic expert in the relevant foreign law field.

I) Individuals and / or institutions that may provide expertise on foreign law (Question 23) [134]

68. As shown in the annexed chart, which presents data from 20 reporting States,[135] a variety of persons or institutions[136] may be utilised to provide expertise on the content of foreign law. States reported[137] that local governments including embassies abroad (e) were the most frequent source of expertise on foreign law,[138] followed by foreign governments including their embassies and consulates (f),[139] and foreign private experts as the third most important source of expertise.[140] Switzerland, Germany, and the Netherlands reported that local specialised institutes (c) and local private experts (a) were the main sources of expertise used,[141] while France reported that foreign judicial authorities (h) were another main source of expertise. The United States of America reported that local private experts (a) and foreign private experts (b), were the most commonly used in courts, with the latter having more credibility.

J) Costs of expertise (Question 24)

69. Regarding the matter of who bears the costs of the expertise provided under any of the methods described in b), e) and i) of Question 17, most States indicated that it was either the party or parties against whom costs would be awarded,[142] or the party or parties that raised the application of foreign law.[143] Some States (such as China (Hong Kong SAR), Hungary and Romania) clarified that the party who raises the application of foreign law absorbs the fees of paying the expert initially, but that this expense will or may be reapportioned to the condemned party at the time of judgment. Poland and the United States of America (in circumstances where the court appoints the expert) reported

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[132] Poland, Sweden, Switzerland and the United Kingdom.
[133] Australia, Austria, Egypt, Estonia, France (which sees this as a serious problem), Germany, Japan, Malaysia, Netherlands, New Zealand, Romania, Slovakia and Turkey.
[134] See chart in Annex 6 of Prel. Doc. No 9 B, *supra*, note 12.
[135] Australia, Austria, China (Hong Kong SAR), Croatia, Egypt, Estonia, France, Germany, Japan, Malaysia, Netherlands, New Zealand, Poland, Romania, Slovakia, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America.
[136] Institutions such as the Swiss Institute of Comparative Law in Lausanne, the Max Planck Institute in Hamburg, the *Deutsches Notarinstitut* in Germany, the *Internationaal Juridisch Instituut* in the Hague, or the CRIDON in France regularly provide, for a fee, expert advice on a wide variety of issues in relation to almost any foreign law.
[137] The data reported in this paragraph is a summary of State responses to Question 23(j) of the Questionnaire.
[138] France, Germany, Poland, Slovakia, Sweden and Turkey.
[139] Austria, France and Turkey.
[140] Austria and the United Kingdom (the latter reported that this source was overwhelmingly the main source).
[141] The Netherlands also indicated that foreign private experts (b) is another source of expertise most frequently used.
[142] Austria, Estonia, Egypt, France, Germany, Hungary, Japan, Netherlands, Poland, Romania, Slovakia, Switzerland (in the majority of Cantons) and the United Kingdom.
[143] China (Hong Kong SAR), Egypt, France, Hungary, Malaysia, New Zealand, Poland, Romania, Switzerland (in the minority of Cantons) and the United States of America.

that all parties can share costs in the methods described in b), e), and i) of Question 17. Seven States reported that the judicial authority would pay these costs in these cases, always or sometimes.[144] New Zealand reported that costs could be paid by the judicial authority only when an expert is appointed under its High Court Rules. Both Australia and New Zealand reported that the presiding judge can make a discretionary ruling as to who will pay such costs, and Australia reported that costs for expert consultation can also be apportioned by way of an agreement between the parties.

K) Circumstances where parties to a law suit rather than a judicial authority initiate engagement of an expert (Question 25)

70. In the case where the parties to a law suit rather than a judicial authority (reported in Questions 21 to 24) initiates the engagement of an expert to determine the content of foreign law, 11[145] of 13 responding States indicated that the answers to Questions 21 to 24 would be the same, while only two States, France and Germany, reported a slight deviation from the policies laid out previously under these questions.[146]

L) Common characteristics of requests for information on foreign law (Question 26)

71. Several States that utilise methods to ascertain the content of foreign law through the use of bilateral or multilateral treaties (as specified in c), g) and k) of Question 17) reported that the types of questions asked under these treaty mechanisms could be of a specific nature, concerning the concrete nature of the legal issue at stake,[147] or a more general nature, or both.[148] Two States[149] reported that the most common type of request was to provide extracts from codes and specific laws in a language that would be understood by the requesting party. Slovenia reported that the most common requests were those that asked for an update on current legislation in force and on established court practice. France reported that the most common request were in the legal domains of protection of persons (minors and adults) and family law.

72. The majority of States responding to this question reported that it is judicial authorities who most frequently ask questions under the methods described in c), g) and k) of Question 17.[150] Two States reported that parties who lack resources to pay an expert is a corollary source of requests.[151] Romania reported that a variety of actors, such as the parties to litigation, their lawyers, executors, notaries, and/or judicial liquidators commonly make requests of this kind.

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[144] Austria, Croatia, Poland, Slovakia (in the "rare case" of 17(b)), Sweden, Switzerland (in the minority of Cantons), Netherlands and New Zealand (in some cases). The Netherlands reported that in the case of 17(b), the *Raad voor de rechtspraak* (Council for the Judiciary) would pay the costs of expertise.

[145] Australia, Austria, China (Hong Kong SAR), Croatia, Estonia, Netherlands, New Zealand, Slovakia, Switzerland, the United Kingdom and the United States of America.

[146] France reported that if the parties formed an agreement for the designation of an expert, the terms of this agreement would also determine how the expenses of this engagement would be determined. The judge can, however, under the rules of civil procedure in some circumstances, readjust the sharing of expenses for expertise, according to the principles of equity. Germany specified that in the case where an expert report is submitted to the court by one or more of the parties to litigation, the court is not bound by this report, and thus the costs of this report will not be absorbed by the court, but these costs may be re-apportioned to the (losing) party or parties according to individual circumstances.

[147] Austria and Croatia.

[148] Lithuania reported that requests can be made for information that encompasses a whole area of law, such as bankruptcy law in the State concerned.

[149] Croatia and Lithuania.

[150] Austria, Croatia, Germany, Poland, Slovenia and Sweden cited judicial authorities exclusively; Hungary and Lithuania cited judicial authorities and parties. Germany reported that the court may also ask the parties to prepare a draft request for information on foreign law, which it will subsequently approve.

[151] Hungary and Lithuania.

73. Reasons given for these requests were most often that the judicial authority seized of the matter lacked materials on the law in question or materials in a language that he or she could understand or that the information available is unreliable or does not contain enough detail,[152] whether after consultation with comparative law resources at a national Ministry (Hungary) or otherwise. Failure of parties to provide adequate information on foreign law was cited as another reason.[153] States also reported the need for up to date translation of or information on current legislation and court practice of foreign jurisdictions.[154] Malaysia reported that if there is a lacuna in the local law, parties will refer to the foreign law for assistance but foreign law is merely applied in court as if it is "merely persuasive in nature and not binding."

M) Transmission of requests for information directly to receiving agencies (Questions 27-28)

74. For those States that used the methods specified in Question 27 (submitting a request for information under a bilateral or multilateral treaty, under the terms of c), g) and k) in Question 17), only four reported that judicial authorities in their State were able to transmit requests for foreign legal information directly to the receiving agency in the State addressed.[155]

75. A far greater majority of States[156] reported that the treaty instruments, both bilateral and multilateral, to which they were Party contained no such provision that allowed for direct contact. A number of States Party to the London Convention noted that judicial authorities must transmit their requests through designated central authorities.[157]

76. Five States reported that requests for information such as those mentioned in Question 27 could be transmitted by regular non-secured email,[158] while seven States said that they could not.[159]

In sum, the answers received to date seem to reflect that:

- Judicial authorities employ a great diversity of methods by which to ascertain, verify, and translate the content of foreign law, following no uniform pattern according to legal tradition.
- The source and requirements of expertise regarding foreign law vary widely by State; reliance on judicial authority (local or foreign) is clearly an exception.
- A majority of States apply a principle whereby it is the party to litigation who raises the issue of foreign law or against whom costs are awarded that is responsible for paying for the consulted foreign law expert.
- The judicial authorities in States are generally not enabled, through conventional or treaty law or otherwise, to make direct requests on information on foreign law to the receiving agency in the State addressed.

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[152] Austria, Croatia, France, Germany, Lithuania and Poland.
[153] France.
[154] Slovenia and Sweden.
[155] The Czech Republic, Egypt, Estonia and Finland.
[156] Austria, Denmark, France, Germany, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Sweden, Switzerland, Turkey and the United Kingdom.
[157] A number of States (Denmark, France, Latvia, Poland, Romania, Slovenia, Sweden, Switzerland) noted that their Ministry of Justice is designated as a transmitting authority.
[158] Denmark, Estonia, Finland, Lithuania and Romania. Lithuania specified, however, that "official channels" of sending requests were preferable. Denmark specified that this method was used presuming the receiving authority would accept such requests, and presuming that no private information was disclosed in such an unsecured email.
[159] Croatia, the Czech Republic, Egypt, Germany, Latvia, Slovak Republic and Turkey. Turkey detailed that the central authority would transmit requests for information to the foreign central authority by official post. Germany indicated that it followed this policy due to the fact that detailed, often confidential, information concerning the case at hand is often transmitted with the request for information, and the fact that there may be problems with authentication of the source of the email (*i.e.*, does the request really originate from the court stated).

Part IV – Future development of an instrument and / or mechanisms to access information on the content of foreign law

A) Current support that the Hague Conference should develop a global instrument or mechanisms to access information on the content of foreign law (Question 29)

1) Overview of responses

77. Twelve States and the European Community (EC) submitted a response to this question.[160] Of these twelve responding States, seven answered affirmatively that they were "of the view that the Hague Conference should develop a global instrument and / or mechanisms to access information on the content of foreign law,"[161] while five of these States indicated that they were not.[162] Several States[163] that answered "no" to Question 29 went on to give input to one or all of Questions 30 to 35 of the Questionnaire, expressing their preferences in the case that such an instrument or mechanism were to be developed by the Hague Conference.

78. It is worth noting that Turkey, while answering "yes" to Question 29, indicated that it preferred "mechanisms" over a global instrument per se. Argentina, on the other hand, clearly used the language of "instrument" (*instrumento*). In general, it was not clear whether many States at this point in time had definite preferences for either an "instrument" or "mechanism(s)" facilitating access to foreign law. The United States of America issued an adjoined comment that it was supportive of the Hague Conference in its continuing work "in exploring mechanisms to provide access to information on the content of foreign law, including consideration of a global instrument." Similarly, the European Community and its Member States indicated, in a general statement, that they support the efforts of the Hague Conference to continue to explore the possibilities for a global instrument or mechanisms for access to information on foreign law.

2) Specific comments

79. Croatia suggested specifically that under such an instrument or mechanism there should be: a) the creation of a body in charge of the monitoring and the provision of information; and b) the creation of a webpage that contains a list of the authorities in the States parties to the instrument or mechanism that are authorized to provide information on foreign law.

80. Egypt stated that such a treaty or mechanism dealing with access to foreign law would be a "great forward step for international legal cooperation." Argentina was similarly very positive about the potential of such an instrument to facilitate international legal co-operation, and that such an instrument could "systematize the cooperation between States in the field of access to foreign law in an agile and organized manner" and "facilitate the labour of technicians who work directly or indirectly with justice and who day by day are confronted by the challenge of resolving situations in which there are foreign elements."

81. Turkey, similar to Argentina, suggested that such an instrument or mechanism should be developed only under the condition that it "accelerates and simplifies" the process of obtaining evidence of foreign law, which would thereby overcome a significant hurdle (i.e., that of delay) that courts confront in their decision-making processes.

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[160] Argentina, Australia, China (Hong Kong SAR), Croatia, Egypt, Iceland, Japan, Malaysia, New Zealand, Switzerland, Turkey and the United States. Responses detailed in this document concerning Questions 30 to 35 of the Questionnaire will be based on these 12 Member State responses only; the EC response did not include specific comments relating to these questions.

[161] Argentina, Croatia, Egypt, Malaysia, Switzerland, Turkey and the United States of America.

[162] Australia, China (Hong Kong SAR), Iceland, Japan and New Zealand.

[163] Australia, China (Hong Kong SAR), Japan and New Zealand. The commentary of these States is included in this document, below, in the Part IV summaries dealing with Questions 30 to 35.

82. The United States of America "believes this project deserves the support of all Members" and is of the view that "[t]his project merits the preparation of an appropriate analytical study by the Permanent Bureau, taking into account the various responses to this Questionnaire that could serve as the basis for the next meeting of experts." The United States of America also suggested that such an instrument or mechanisms should remain flexible enough to assess the needs of both civil law and common law systems, taking into account the varied use of foreign law by these systems.[164]

83. While the EC did not issue responses to the enumerated questions in the Permanent Bureau access to foreign law Questionnaire, it responded with a general policy statement on the matter.[165] The following paragraphs are excerpts from this statement:

> "The Member States of the European Community welcome the work undertaken by the Hague Conference in this field. Facilitating access to foreign law is of interest to the European Community and the Member States would therefore support the continuation of work in this field. Use could be made of possibilities offered by information technology in terms of rapidity and multilingualism.
>
> Within the European Union, several initiatives provide direct access to databases on EU and national law, such as EUR-Lex (http://eur-lex.europa.eu/), N-lex (http://eur-lex.europa.eu/n-lex/) and the European Judicial Network in civil and commercial matters (http://ec.europa.eu/civiljustice/).
>
> Setting up a global mechanism to facilitate access to foreign law is an ambitious project. The difficulties related to such an initiative should not be underestimated. However, the Member States of the European Community support further preparatory work within the framework of the Hague Conference with a view to assessing the possibilities and potential added value of a new global instrument in this field."

84. Three of the five States that answered negatively to this question (Question 29) gave details as to the basis of their response. Australia and New Zealand stated that they thought that the (limited) resources of the Hague Conference could be better spent in other areas at this point in time, given that they did not see the accessibility to information on foreign law as presently a matter of sufficient concern. Australia further explained that "it is not clear what the scope and nature of any proposed instrument or mechanisms might be." Japan stated that "[w]e are of the view that the usefulness of such instrument or mechanisms should be considered carefully in comparison with other efficient tools [such] as the internet."

85. Switzerland, while reporting that it supported the development of a new instrument or mechanism with respect to foreign law, stated that "[e]ven the positive majority [of cantons] mention that it appears even to them that there is no need for such an instrument," [166] citing that in Switzerland there are already enough sources and not a significant number of cases requiring the application of foreign law.

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[164] For instance, the United States of America suggested that, in designing mechanisms for access to foreign law under a new instrument or mechanism, the Hague Conference should "consider means to blend the civil law and common law traditions, including how such mechanisms might be used in an ongoing proceeding and at what point opinions could be meaningful… [f]or example, would one want to wait for a determination of any issues of fact before seeking the appropriate foreign law?"

[165] A total of 18 States that are Members of the Hague Conference, that are also members of the EU, submitted a response to this Questionnaire, Parts I to III: Austria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Romania, Slovakia, Slovenia, Sweden and the United Kingdom.

[166] Switzerland specified that a 2/3 majority of its cantons were in favour of a new instrument or mechanism on the subject of access to foreign law, while a 1/3 minority were not in favour.

B) Flexibility under a global instrument / mechanism in the availability of several channels through which information on foreign law can be sought and in relation to experts from whom information can be obtained (Question 30(a)(i))

86. Nine States[167] responding to this question indicated that they were in favour of flexibility under an instrument or mechanism with respect to the availability of several channels through which information on foreign law could be sought and in relation to experts from whom information could be obtained.

87. Switzerland offered the caveat that such an instrument, while retaining flexibility, should also use only one main circuit to channel requests, as it may otherwise waste time in the research and selection of the source of a response.

88. Malaysia cited the benefit of having such an instrument with the flexibility described in Question 30(a)(i) as potentially enabling the instrument to have a wider scope and provide more options to "people and States."

89. Similarly, Turkey suggested that such flexibility could offer tailor-made solutions faced with the natural diversity of legal cases, each of which have their "own features and alternative ways of obtaining evidence […] depending on the situation." Also, Turkey noted that allowing such flexibility would encourage States to be a party to the instrument or mechanism as they would be able to use existing alternative modes of obtaining information on foreign law.

90. Argentina and the United States of America provided specific suggestions about how such a flexible instrument or mechanism might be engineered. Argentina suggested that under such a mechanism information could be in general provided by organisations or authorities with competence in the relevant areas of law that have been requested, but could, if necessary, also have the option of referring the questions to private professionals with a recognised expertise in the subject.

91. The United States of America expressed a general concern about the potential for bias or unrepresentative opinions concerning the content of foreign law under a given instrument or mechanism, and suggested that a way to minimize this potential for bias would be that "any mechanism might place the responsibility for providing information on a country's law on (1) a judge assigned to provide responses to requests for information about that country's law; (2) an expert or experts appointed by the country; (3) an institute modelled on, for example, the Max Planck Institute; or (4) an expert or experts appointed by the home court or parties." The United States of America further encouraged the Hague Conference to "consider simpler mechanisms that encourage the judiciary in one state to communicate with those in another, even by informal channels."

92. The United States of America expressed its preference that a potential mechanism involve a case-tailored set of experts empanelled for the specific issue, rather than a set list of experts, in order that this expert panel may provide "a more balanced answer than one specific judge using a coterie of his / her favorite experts."

93. Further, the United States of America also suggested, like other responding States, that within any flexible mechanism, there should be an appropriate system to funnel requests to an appropriate source. For example, the United States cited some scholars as suggesting that the Federal Judicial Center could serve as such a "neutral entity" through which to funnel requests, which could then convene a panel of experts to provide an opinion on a request for information. The Federal Judicial Center (or other bodies or

[167] Argentina, Australia, Croatia, Egypt, Malaysia, New Zealand, Switzerland, Turkey and the United States of America.

agencies) could also maintain lists and databases of appropriate experts, provided that such a database addressed the above-mentioned risk of bias.

C) The use that could be made of each such channel and expert (Question 30(a)(ii))

94. Regarding flexibility in the use that could be made of each such channel and expert to ascertain the content of foreign law, all nine responding States save one[168] reported that they would be in favour of such flexibility.

95. Croatia echoed Turkey's statement under Question 30 (a)(i) that such flexibility in the use that can be made of channels / experts would offer options according to the circumstances of each particular case. Malaysia suggested that any one channel or expert may be competent to provide information on more than one area of law, so flexibility as to usage of these channels or experts would be desirable.

D) The availability of information technologies to ensure the speedy processing of requests and to alleviate language barriers (Question 30(a)(iii))

96. Eight responding States[169] answered affirmatively that they supported the use of information technology to ensure the speedy processing of requests and the alleviation of language barriers in accessing foreign law. Argentina expressed its concern that the security of transmissions of information through the use of online and email technologies should be guaranteed. Turkey suggested that it would be supportive of the use of information technology in order to assist in shortening the litigation process.

E) Whether information received should provide an objective / general description of the foreign State law or an answer specific to the case at hand (Question 30(b))

97. Seven[170] of nine responding States indicated that they would be in favour of the provision of an objective and general description of the law of the foreign State (including references to relevant case law) rather than a specific answer with regards to a given case, and two responding States[171] indicated that they would prefer a mechanism whereby both types of information could be requested.

98. Croatia stated that it preferred the former because "[t]he application of law is part of administration of justice, and administration of justice must remain within the purview of the judge." Switzerland detailed that while three quarters of its cantons preferred a more general account of the law, one quarter requested a more specific account of the law in relation to the case at hand because of the "the impossibility of knowing and of applying the subtleties of foreign law if the description is general."

99. Malaysia reported that it preferred received information to encompass both a general account of the law as well as a specific answer to the foreign law in order to have a clear understanding of its application.

100. The United States of America expressed a similar preference, and provided details of a mechanism already at work within the United States of America that could be used as a model on the global level, whereby federal courts of the United States of America certify questions of uncertain state law at the highest courts of individual states of the

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[168] Turkey answered negatively to this question, citing the need for a quicker and simpler global mechanism to access foreign law. Argentina, Australia, Croatia, Egypt, Malaysia, New Zealand, Switzerland and the United States of America answered affirmatively.
[169] Argentina, Australia, Croatia, Egypt, Malaysia, New Zealand, Switzerland and the United States of America.
[170] Argentina, Australia, Croatia, Egypt, New Zealand, Switzerland and Turkey.
[171] Malaysia and the United States of America.

union.[172] As well as urging the Hague Conference to explore the possibility of providing a mechanism whereby certified questions of application of law to facts can be provided,[173] the United States of America also asserted that general statements as to the content of foreign law are often equally required, as with an account of relevant statutes of limitations, for example.

F) Should the information received be non-binding or binding? (Question 30(c))

101. All nine States responding to this question answered affirmatively that the information received on foreign law should not be binding on the receiving court.[174]

102. The United States of America further specified that such solicited information on foreign law would be non-binding on the specific proceeding for which the information was sought, in that, under its legal system, it "would constitute prima facie evidence subject to potential rebuttal." Thus, the usefulness of this received opinion on foreign law would depend on the persuasiveness of its reasoning and the sources upon which it relied.

G) Areas of law that the instrument / mechanism should address (Question 30(d))

103. All nine States responding to this question answered affirmatively that such an instrument or mechanism should be of general scope in order to permit access to different areas of foreign law.[175]

104. Croatia commented that such generality is necessary for complex cases that may require the application of various areas of law. Australia suggested that the instrument should provide an option whereby a State could choose to exclude certain areas of the law, if necessary.

H) Provision of legal assistance to accommodate individuals with few or no resources (Question 30(e))

105. Five responding States[176] answered affirmatively that such an instrument or mechanism should contain provisions on legal assistance to accommodate individuals with few or no resources, while three responding States suggested that it should not.[177]

106. Argentina suggested that as a rule there should be a principle of gratuity for access to foreign legal information, but that when a request is referred to experts, the costs for engaging such experts should be reimbursed. Switzerland reported that a minority (one third) of its cantons questioned the practicality of such provisions and suggested that the judicial assistance already offered by Swiss legal fora is sufficient.

107. Australia and New Zealand both stated that the issue of legal assistance is better dealt with in other separate instruments.[178]

108. The United States of America stated that "while it might be able to establish agreed procedures for arriving at the costs of these information requests, it is highly unlikely that the United States at this time would participate in a mechanism that requires government funding of responses." Elsewhere in the Questionnaire, the United States of

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[172] The United States of America detailed that the certification process, available in some form in over forty-four states, usually requires "the facts relevant to the [certified] question, showing fully the nature of the controversy out of which the question arose." Uniform Certification of Questions of Law [Act][Rule] (1995), 12 Uniform Laws Annotated (1996).

[173] In regards to providing a specific, certified account of the relevant foreign law, the United States of America went on to state that ,"often the determination for the common law system will need to be viewed within the specific context presented by the case in question."

[174] Argentina, Australia, Croatia, Egypt, Malaysia, New Zealand, Switzerland (100% of Cantons agreeing), Turkey and the United States of America.

[175] Argentina, Australia, Croatia, Egypt, Malaysia, New Zealand, Switzerland, Turkey and the United States of America.

[176] Argentina, Egypt, Malaysia, Switzerland and Turkey.

[177] Australia, New Zealand and the United States of America.

[178] Australia cited the *Hague Convention of 25 October 1980 on International Access to Justice*.

America expressed its concern that the costs associated with mechanisms used in order to access information on foreign law "would also need to be appropriate to the smaller litigations where party-appointed experts are both costly and time-consuming."

I) Extension of the instrument / mechanism to notaries and other professionals in non-litigation contexts (Question 30(f))

109. Five responding States[179] supported the extension of a potential instrument or mechanism to notaries or other professionals outside of the litigation context, while four States[180] did not support such an extension.

110. Croatia suggested that such professionals should be allowed to access information on the content of foreign law only if, under internal law, they have been delegated with authority to make a decision on the merits of a case. However, Croatia stated that all bodies performing public service functions should have access to information on foreign law in order to properly fulfil their administrative functions.

111. Australia and New Zealand both commented that under their internal law a particular standard of proof is required to use foreign law in court proceedings,[181] and other users such as notaries would be outside of this regulatory regime and hence might be difficult to integrate into an instrument's mechanism. New Zealand suggested that it would be less problematic if such an extension "were optional rather than part of the core obligations of any instrument that might be concluded." Turkey stated that in order to broaden the scope of such an instrument or mechanism, a sufficient infrastructure would have to be provided, and the United States of America suggested that in the initial phase the scope of an instrument or mechanism should be limited to litigation proceedings,[182] with the option of extending it to other uses in the future.

J) Use of an online central database of State / REIO law or online country profiles in standard electronic format (Questions 31-33)

112. Five responding States[183] indicated that they would be in favour of making information on the content of their State available online in a central database (Question 31), while four States expressed doubts as to the overall gains of providing a centralized comprehensive database of their law apart from what is already provided.[184]

113. Croatia stated that such a database would "save time and money and facilitate the exercise of the right of access to court," and Turkey remarked that such a database "would be beneficial for the smooth operation of the [judicial] process."

114. Malaysia commented that such information is already provided online by non-governmental (private) bodies, but acknowledged that such private databases required a subscription fees to be paid. Australia and the United States of America also cited the availability of these resources through private service providers of national legal databases.

115. New Zealand suggested that while it did not foresee an adequate cost-benefit return on providing its national legal information on a central database, it foresaw that

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[179] Argentina, Croatia, Egypt, Malaysia and Switzerland.
[180] Australia, New Zealand, Turkey and the United States of America.
[181] Australia specified that issues of foreign law in court proceedings are dealt with under its *Evidence Act 1995* and parallel Australian state and territory legislation.
[182] If the scope or part of the scope of a future treaty or mechanism on access to foreign law were to be limited to "litigation proceedings," some specifics of what would be meant by this term would have to be defined.
[183] Croatia, Egypt, Japan, Switzerland and Turkey.
[184] Australia, Malaysia, New Zealand and the United States of America.

merely providing guidance on where to locate information on New Zealand's law on the internet could be very useful.

116. Australia remarked that even if it provided judgments setting out all common law decisions in a central database (statutes, subordinate legislation and some judgments are already available online through the website of each Australian jurisdiction), such a body of case law would be difficult to navigate.

117. The United States of America reported that while such a centralised and comprehensive database of its national law "could have great utility in many situations," the decentralised nature of the United States' national system (including 50 states as well as other districts and territories) would make such a database a challenge.

118. Regarding the utility of a schema of providing information on the content of State or REIO law available online in a standard electronic format (*e.g.*, in the form of country profiles that are based on a pre-established, harmonised structure) available in English or French or other non-official languages (Question 32), a slight majority (6) of States[185] responded that they would be supportive of such a scheme, while five States indicated that they would not,[186] generally citing as a reason the financial burdens that such a system may entail.

119. Argentina praised the idea of using a system of standardised forms on relevant areas of law that would be of interest to the international community, citing the very successful work carried out by the European Judicial Network,[187] and stressing the importance that external, international users can access national legal information in languages such as English, French and Spanish, while still having access to the complete text of the original internal law or legislation.

120. Japan and Turkey, while supportive of such a system, both raised concerns about the financial burden that would be involved in translation of national legal documents to non-official language(s) like English and French, with Japan suggesting that such an obligation be optional.

121. Croatia stated that having law available in such a form would "reduce the number of disputes because the outcome of the dispute would be less uncertain for the party," and stressed the utility of providing the information in English and French in view of the international usage of these languages.

122. China (Hong Kong SAR) reported that it would be difficult to provide such schematized information in a standardized electronic format based on its common law case law tradition where decisions of the court are not given in a particular format. New Zealand remarked that information provided in such a manner would be of a generic nature and thus would not be a substitute for specific advice pertaining to individual cases. And finally, Malaysia stated that its law is already available online in English and Malay (through private databases).

123. Regarding the areas of law that would potentially be made available worldwide under the scheme described in Questions 31 and 32 (Question 33), seven States[188] gave preferences regarding the areas of law they thought should be included, with preferences fairly evenly spread out among all the areas of law enumerated in the Questionnaire.[189] Egypt also suggested that the area of criminal law be included in online databases.

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[185] Argentina, Croatia, Egypt, Japan, Switzerland and Turkey.
[186] Australia, China (Hong Kong SAR), Malaysia, New Zealand and the United States of America.
[187] The European Judicial Network (http://ec.europa.eu/civiljustice) provides information on European state members, community and European law, and distinct themes of civil and commercial law in 22 languages.
[188] Argentina, Croatia, Egypt, Japan, Malaysia, Switzerland and Turkey.
[189] See bar graph in Annex 7, *supra,* note 12.

K) Desirability of combining a (treaty) instrument with online schemes mentioned in Questions 31 and 32 (Question 34)

124. Five States[190] reported that they would be supportive of combining an instrument or mechanism (mentioned in Question 29) with the internet-based schemes mentioned in Questions 31 and 32.[191]

125. Argentina expressed in detail why it foresaw a sound rationale for combining the instruments/mechanisms mentioned in Questions 29, 31 and 32:

> "The elaboration of an international convention in combination with instruments mentioned in points 31 and 32 appears clearly desirable and reasonable from practice, since these instruments would complement the legal (treaty) instrument with a database that would permit in certain instances the speeding up of access to the content of the foreign law for people or organisations involved with private international law cases, and would also facilitate the work of authorities or organisations charged with providing the information, and could limit their labour only to those instances where a more extensive analysis or detailed response is required."

126. Croatia suggested that having online information accessible at any time from anywhere in the world would be highly desirable. Switzerland, echoing Argentina's comments, suggested that combining the above-mentioned instruments would be very profitable in terms of the "synergetic effects" of the various instruments/mechanisms working together.

L) Other comments on proposed models of Preliminary Document No 21 A (Question 35)

127. Malaysia was the only State that commented on the proposed models for a new (treaty) instrument articulated in the Permanent Bureau Preliminary Document No 21 A (Question 35).[192]

128. Malaysia stated that it would not be amenable to either the "Information Sheets and Country Profiles Model," based on the commitment of resources that this model would entail for Malaysia, or the "Direct Judicial Communications Model," as in Malaysia's view the provision of such legal information is not part of judges' duties. Malaysia stated, however, that the "Network(s) of Experts and Specialised Institutes Model" and the "Revision of the Co-operative Mechanisms of the London and Montevideo Conventions" could be given "due consideration."

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[190] Argentina, Croatia, Egypt, Switzerland and Turkey.
[191] Australia, Japan, Malaysia and the United States of America answered negatively to this question.
[192] See Prel. Doc. No 21 A of March 2007, *supra*, note 8.

ADDENDUM – RÉPONSES AU QUESTIONNAIRE DU PORTUGAL

ADDENDUM – RESPONSES TO THE QUESTIONNAIRE FROM PORTUGAL

From the Directorate-General for Justice Policy (DGPJ), Ministry of Justice of Portugal:

Answers to questions 1 to 28 (Parts I to III) of the Hague Conference Questionnaire addressed to Members to assess the practical difficulties in accessing the content of foreign law and the need for the development of a global instrument in this area

Part I – General Questions

Please answer the following general questions with regard to the *European Convention of 7 June 1968 on Information on Foreign Law* (the "London Convention"), the *Inter-American Convention of 8 May 1979 on Proof of and Information on Foreign Law* (the "Montevideo Convention"), the *Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters* (the "Minsk Convention") and any bilateral treaty on proof of and / or information on foreign law ("bilateral treaty").

1) Is your State Party to:
   a) The London Convention **YES**
   b) The Montevideo Convention
   c) The Minsk Convention
   d) Any bilateral treaty

2) If not, does your State intend to become in the near future a Party to:

   a) The London Convention **N / A**
   b) The Montevideo Convention
   c) The Minsk Convention
   d) or conclude any bilateral treaty

3) Please indicate (if applicable) the number of requests received in 2006 and the average number of weeks taken to respond to the requests under:

   a) The London Convention No of requests: _**2**_ No of weeks: _**4**_
   b) The Montevideo Convention
   c) The Minsk Convention
   d) Any bilateral treaty

4) Please indicate (if applicable) the number of requests that emanated from the judicial authorities in your State in 2006 and the average number of weeks taken to respond to these requests under:

   a) The London Convention No of requests: _**1**_ No of weeks: _**15**_
   b) The Montevideo Convention
   c) The Minsk Convention
   d) Any bilateral treaty

5) Do you foresee an increase in the number of requests referred to in:
   a) Question No 3 (incoming requests)
      [**X**] YES
      [ ] NO
   b) Question No 4 (outgoing requests)?
      [**X**] YES
      [ ] NO

6) If so, in which areas of the law? Please specify for each of the sub-questions:

In general, both incoming and outgoing requests are related to all areas of Private Law. In both cases, Family Law (divorce, matrimonial property regimes, parental responsibility, maintenance obligations), civil procedure (in particular, recognition and enforcement of foreign decisions) and corporate Law are often object of requests. It should be noted, however, that in a significant number of cases, requests are not addressed in the terms of the London Convention, but by other formal or informal means; embassies, email, judicial networks (such as the European Judicial network in civil and commercial matters), etc.

7) Please indicate, if applicable, in bullet form to what extent you are satisfied with the instruments referred to in Question No 1:

- **impartiality of information sources;**
- **reliability of information provided;**
- **free of charge;**
- **access to law**

8) Please indicate, if applicable, in bullet form any shortcomings of these instruments:

- **lack of mechanisms to avoid and overcome translations deficiencies;**
- **outdated contacts of some reception organs under the London Convention;**
- **lack of a point of contact in the Council of Europe, to, whom the reception organs can address in case of difficulties;**
- **lack of reasonable delays to provide information;**
- **lack of mechanisms to overcome long delays**

Part II – Free public access to information on the content of the law

9) Does your State and / or Regional Economic Integration Organisation ("REIO") provide online access to its legislation12 through an official (governmental) website?

[**X**] YES. Please specify whether this information is also provided in a non-official language and, if so, in which language(s):

In Portugal, it is possible to have online access to the Official Journal ("Diàrio da República"), where all national legislation is published. Nevertheless, free access is only provided for legislation published in the last 30 days and the website is exclusively in Portuguese.

[ ] NO. Does another, non-governmental body or organisation provide this information online (please specify which organisation or body)?

10) Does your State and / or REIO respond to written or oral requests for information on the content and / or application of its law?

[**X**] YES. Please specify for which areas of the law:

Portuguese authorities reply both in writing and orally to questions related to the content and application of Portuguese law, namely via the GDDC (official transmission organ under the London Convention). All areas of the law are covered, including criminal law.

[ ] NO. Does another, non-governmental body or organisation provide this service (please specify which organisation or body)?

11) Are the services in Question No 10 available to people in other States?

[**X**] YES. Is this service offered in any non-official language and, if so, in which?
Requests are accepted in French, Spanish, or English.

[ ] NO

12) If yes, do people in other States have access to this service at the same costs as residents?

[**X**] YES
Service is provided free of charge both to Portuguese citizens and foreigners, public and private entities.

[ ] NO

13) Do you foresee the proportion of people in other States using these services increase in the future?

[**X**] YES
[ ] NO
Please specify:

Part III – Access to information on the content of foreign law at the litigation stage

14) Please indicate, where possible, a rough estimate of the percentage of civil and commercial law cases heard by the judicial authorities of your State in 2006 which required the application of foreign law and whether this percentage is likely to increase. If no estimate can be obtained for 2006, please refer to another year. Percentage: ___% (year: ____). Likely to increase: [ ] YES [ ] NO

There are no available statistics on this matter. It should be emphasized that courts are not bound to submit a request when the question of application of foreign law arises.

15) Please indicate, if possible, the most common areas of foreign law applied by or invoked before the judicial authorities of your State.

[ ] Marriage and nullity of marriage
[ ] Divorce and legal separations
[ ] Parental responsibility
[ ] Parent-child relationship
[ ] International child protection including child abduction and child adoption
[ ] Protection of adults
[ ] Maintenance (child support and other forms of family support)
[ ] Traffic accidents
[ ] Products liability
[ ] Other types of tort
[ ] Consumer protection
[ ] Commercial contracts
[ ] Sale of goods
[ ] Securities transactions
[ ] Property
[ ] Inheritance
[ ] Bankruptcy
[ ] Choice of court agreements
[ ] Other, please specify:

There are no available data on this matter.

16) Please identify, if possible, the States whose laws are most frequently applied by or invoked before judicial authorities in your State:

Countries with which Portugal has more significant migrant flows, namely France, Spain, United Kingdom, Netherlands, Germany, Italy, Luxemburg, Belgium, Switzerland, Eastern European countries, as Romania, Russia, Moldova and Ukraine, as well as Portuguese speaking countries, as Angola, Guinea Bissau and Cape Verde.

17) In your State, a judicial authority ascertains foreign law (check more than one box if applicable):

a) [ ] *ex officio* without the assistance of an expert (*e.g.* law firm, specialised institute, university, government (*i.e.* specialised department or embassy), etc.)
b) [ ] *ex officio* with the assistance of an expert
c) [ ] by submitting, *ex officio*, a request for information under a bilateral or multilateral treaty (where applicable)
d) [ ] as the result of an (express) agreement of all parties, without the assistance of an expert
e) [ ] as the result of an (express) agreement of all parties, with the assistance of an expert chosen (appointed) by the judicial authority
f) [ ] as the result of an (express) agreement of all parties, with the assistance of an expert chosen (appointed) by all parties
g) [ ] by submitting, as the result of an (express) agreement of all parties, a request for information under a bilateral or multilateral treaty (where applicable)
h) [ ] at the request of a party (without the objection of the other or another party) or all parties, without the assistance of an expert
i) [ ] at the request of a party (without the objection of the other or another party) or all parties, with the assistance of an expert chosen (appointed) by the judicial authority
j) [ ] at the request of a party (without the objection of the other or another party) or all parties, with the assistance of an expert chosen (appointed) by one or all parties
k) [ ] by submitting, at the request of a party (without the objection of the other or another party) or all parties, a request for information under a bilateral or multilateral treaty (where applicable)
l) [ ] by any other method (please specify):

According to article 348 of the Portuguese Civil Code, although the party who requests the application of foreign law has a burden of proof of both existence and content of the foreign law invoked, the judge must also seek to determine such existence and content, by all means available ("*iura novit curia*"). It has been discussed among Portuguese doctrine whether this should be considered or not as a burden of *proof proprio sensu*, with some authors considering that this is in fact a mere burden of "*allegation,*" derived from the general duty of cooperation with the court. In favour of such argument is the fact that the Civil Code expressly provides for the *ex officio* obligation in this matter. In the same line of reasoning, the Portuguese Procedural Civil Code (article 721°) establishes that the violation of foreign law is a ground for appeal. This will be the case if foreign law is wrongly interpreted or applied, or the applicable law is not correctly determined.

An express agreement of all parties is not needed. A judicial authority will ascertain foreign law *ex officio* even if none of the parties has requested it, or the other party has admitted its existence/content or also in the case where there is no objection of the other or another party (article 348,2).

It should be noted, however, that these rules are applicable only to foreign conflict of laws rules or substantive law and not to Portuguese Private International Law rules, either from an internal or international source. Furthermore, it should be added, that interpretation of foreign law should follow the rules of the respective legal system (article 23 of the Portuguese Civil Code). Finally, as a last resource, in the case where it is deemed absolutely impossible to determine the content of foreign law in an individual case (and provided that it is not possible to follow a subsidiary connection), Portuguese law will apply. It should be stressed, however, that this possibility is widely recognized among academia and practitioners as a marginal tool to avoid *non liquet*.

18) Please rank in order of priority (1 being the highest) the sources consulted by judicial authorities in your State to ascertain the content of foreign law under any of the methods described in a), d) and h) of Question No 17:

[ ] Internet (official legislation, case-law and legal publications websites)
[ ] Internet (legislation, case-law and legal publications from private databases (as opposed to official databases))
[ ] Local or personal library (local electronic databases)
[ ] Local or personal library (printed legislation, case-law and legal publications)
[ ] Other:

Statistics on this matter are not available. Each magistrate will follow his / her own procedure.

19) Please explain whether and, if so, how the judicial authorities in your State verify the reliability and / or authenticity of these sources and the information provided therein:

The entities responsible for providing information, in Portugal, are official organisms within the Ministry of Justice, and there is a guarantee of updated information.

20) Where these sources and the information provided therein are not available in a language understood by the judicial authority, please describe the mechanisms used to address this difficulty. Description:

If it is a request under the London Convention, procedures established therein are followed. Where a solution is not envisaged or if the Convention is not applicable, requests are often addressed to the Portuguese Embassies abroad.

21) Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and i) of Question No 17), does this expert need to be a qualified lawyer or jurist in accordance with the law of your State? In the case of a specialised institute, does it need to meet certain requirements?

[ ] YES
[ ] NO

There are no available data on this matter.

22) Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and i) of Question No 17), does this expert need to be a qualified lawyer or jurist in accordance with the law of the State whose laws are being ascertained? In the case of a specialised institute, does it need to meet certain requirements?

[ ] YES
[ ] NO

There are no available data on this matter.

25) Would your answers to Questions Nos 21-24 be the same for the expert referred to under f) and j) of Question No 17?

[**X**] YES

[ ] NO, please explain:

[No comments were offered for Questions 23, 24, 26, 27 and 28]